IN THE HIGH COURT OF JUDICATURE AT BOBBY
APPELLATE SIDE JURISDICTION
CRIMINAL APPEAL NO.643 OF 1996

Kundan Gangaram Sirsat)
Age 22 years,)
residing at Wadar Galli)
Temburni, Taluka - Madha,)
District : Solapur) .. Appellant.

V/s

The State of Maharashtra) .. Respondent.

Mr. Dilip Bodke for the appellant.

Mr. A.S. Shitole, APP for the State.

CORAM : V.G.PALSHIKAR & R.C.CHAVAN, JJ

DATED : 18th JULY, 2005

COMMON ORAL JUDGMENT : (Per R.C.Chavan, J)

1. Being aggrieved by his conviction for an offence punishable under section 302 of the Indian Penal Code and the resultant sentence inflicted upon him, the appellant has preferred this appeal.

2. The facts which gave rise to the appellant's prosecution are as under:-

. Victim Manjula is widow of one Baban. After his death, she had illicit relations with the appellant for about one and half years and the appellant used to visit Manjula's house. On 24/7/1995, at about 5.30

p.m., appellant went to the house of Manjula, alleged that Manjula had played black magic on his brother Baburao, leading to Baburao's death and added that, therefore, the appellant wanted to kill Manjulabai. He did not pay any heed to the request of Manjula to let her go. He poured kerosene on her person and set her on fire. She extinguished the fire by pouring water on her person. The accused went on the pretext of bringing a jeep but did not return.

. Manjula herself came to the Police Station and was taken to the hospital. It seems that Manjula had jumped in to the well near the Police Station after she had gone to make a report and had to be taken out from the well by policemen. Manjula succumbed to her injuries while undertaking treatment at civil hospital at Solapur on 29/7/1995. During her stay in the hospital, she had orally stated about cause of her injuries to the Medical Officer and others. Her dying declaration was also duly recorded by the police. On her statement, an offence was registered and investigation commenced. In course of an investigation, Police performed inquest, sent the dead body for post-mortem examination, recorded statements of witnesses and on completion of investigation arrested and chargesheeted the accused.

3. The learned Judicial Magistrate, First Class, Madha, to whom the charge-sheet was presented, committed the case to the Court of Sessions at Solapur on finding that the accused was involved in commission of offence of murder triable exclusively by the Court of Sessions.

4. The learned Additional Sessions Judge to whom the case was assigned, framed a charge of offence punishable under section 302 of the Indian Penal Code against the appellant to which the appellant pleaded not guilty. He was, therefore, put on trial.

5. Prosecution examined in all 12 witnesses in order to bring home the guilt of the accused. After examining the accused under section 313 of the Criminal Procedure Code and considering the arguments advanced, the learned Additional Sessions Judge came to hold the accused guilty of an offence of murder punishable under section 302 of the Indian Penal Code and proceeded to sentence the accused to imprisonment for life and fine of Rs 1000/-. Aggrieved thereby, this appeal has been filed.

6. We have heard the learned counsel for the appellant as well as the learned Additional Public Prosecutor for the State. The learned Counsel for the

appellant submitted that though the victim is shown to reside in a thickly populated area as may be seen from the panchnama of spot at Exhibit-37 and though in her statement at Exhibit 34 the victim had stated that the incident was seen by Malan Wadar, her husband Parmeshwar Wadar and other neighbours, there are no eye witnesses. P.W. 7 - Meenabai who was supposed to have seen the accused at the house of Manjula, turned hostile and refused to support the prosecution case. It may also be seen that according to the victim's own statement at Exhibit-34, the quarrel arose only on the incidental evening and, therefore, there is no evidence of any prior discord, motivating the accused to commit this murder.

7. We have, therefore, to depend only upon the word of the victim to find out as to how she suffered injuries which led to her death. P.W. 2 - Dr. Chinchure states that on 25/7/1995, at about 2.00 a.m., the victim was brought to the hospital. Dr. Chinchure (P.W.2) called the Medical Officer from Surgeory Section. When he inquired with the victim about history, the victim told him that she had burnt herself at 5.30 p.m. on the previous evening. He accordingly made entry at Exhibit-18. Dr. Chinchure (P.W.2) states that, thereafter, the victim told Registrar of Surgery Department that she had sustained

homicidal burns. He also stated that the victim told the Surgery Registrar that she had been pushed into the well. A statement was accordingly recorded, according to Dr. Chinchure (P.W.2), by the Police, which is at Exhibit-14, wherein the victim had told that the accused had poured kerosene and set her on fire.

8. P.W. 4 - Police Head Constable Dnyaneshwar, who had taken the victim to civil hospital at Solapur, stated that he made inquiries with the victim as to how she had sustained burns, after the doctor certified that she was fit to make statement. The statement is at Exhibit-14 which has already been referred to. This witness (P.W.4 - Police Head Constable Dnyaneshwar), admitted that he felt that Magistrate should be called. It may be seen from the statement at Exhibit-14 that it is in two parts. The first part is about the injuries sustained by the victim due to fire and the second part is about victim's jumping into the well near Tembhurni Police Station. The victim stated that when she came to Tembhurni Police Station, since her pain was unbearable, she jumped into the well near the Police Station. This contrasts with the victim's story to Surgery Registrar that she was pushed into the well.

9. P.W. 5 - Manikbai is an aunt of the victim. She stated that, on learning of the incident, she went to the civil hospital where she was informed by the victim that accused had picked up kerosene barrel, poured kerosene on her person and set her on fire. It may be seen from the cross-examination of this witness (P.W.5 -Manikbai) that she herself is staying with Ilahi Shaikh to whom she is not married. Her sister Nagin is also residing with somebody in Parbhani District without marrying that person. She denied that victim's mother too was somebody's mistress and contradicted the relevant portion in her police statement. She also contradicted the portion relating to the fact that the victim was staying as mistress with the accused.

10. Prosecution examined one Santosh Kamble as P.W.6 to prove purchase of 5 liters of kerosene by the deceased on 20/7/1995. This witness did not support the prosecution. It is, however, not clear as to how the purchase of 5 liters of kerosene by the victim before the incident will help the prosecution in connecting the accused to the burn injuries on the victim, if the victim herself had purchased kerosene.

11. P.W. 9 - Police Constable Balu Chavan, stated that he was asked to take the victim to Primary Health

Centre, Tembburni. Since the Medical Officer was not available there, he took the victim to Government Hospital at Modnimb. He states that while proceeding to Modnimb, the victim informed him that the accused had set her on fire. He stated that the Medical Officer at Modnimb refused to admit the patient and hence he returned to Police Station, Tembhurni and handed over the victim to another constable. He states that while returning from Modnimb, the victim jumped in to the well near the Police Station, Tembhurni.

12. P.W. 10 - Head Constable Ambadas stated that when he inquired with the victim on 24/7/1995, she told him that the accused Kundan Shirsat had set her on fire. He proved the report at Exhibit-34. This witness (P.W.10) stated in his cross-examination that, after taking the report of the victim, he came to know that the victim had fallen in to the well near the Police Station but did not inquire as to how the victim fell in to the well.

13. P.W. 11 - PSI Shaikh conducted investigation and P.W. 12 - Dr. Deshmukh claimed to have examined the patient and treated her till she died.

14. The learned counsel for the appellant submitted that the evidence recounted above would show that the case rests solely on the account of the incident given by the victim to various authorities. He submitted that though dying declaration recorded by policeman at Exhibit-14 indicates involvement of the appellant, it may not be taken seriously because the appellant's father himself was serving as Police Constable in the same Police Station and had an enmity with P.W. 10 - Police Head Constable Wankhede. He submitted that due to this enmity, the whole case was concocted. According to the learned Counsel, the first independent authority to whom the victim made disclosure about the cause of her injuries was P.W. 2 - Dr. Chinchure. Dr. Chinchure states that the patient informed him that she burnt herself at 5.30 p.m. The doctor has accordingly made an entry in the case-papers. It may be seen that Dr. Chinchure - P.W. 2 had been candid enough to state that the victim told Surgery Registrar, very much in his presence, that the victim had sustained homicidal burns. Therefore, it cannot be said that Dr. Chinchure (P.W.2) is coming out with any make believe story. In any case, there is no motive for Dr. Chinchure (P.W.2) to come up with any such story.

15. It may be seen that, in this case, though the victim was alive for almost three days after the incident, a Magistrate does not seem to have recorded her dying declaration. The evidence of P.W. 9 - Balu Chavan would show that the victim had jumped in to the well. The cause for jumping given in Exhibit-14 is not convincing. It may also be seen that in Exhibit-14, the victim had said that the accused left, saying that he would bring a jeep, presumably to take the victim for treatment. If the accused had himself set the victim on fire, his assurance that he would go to bring a jeep would be inconsistent. It is difficult to believe that the victim would jump in 40 ft deep well without knowing the consequences of such jump, merely because the victim was in pain and had burning sensation. The jumping in well is consistent with the story given to P.W. 2 - Dr. Chinchure. Thus, it may be that the victim first attempted to commit suicide by setting herself on fire and then even jumped in to the well when she was accompanying the policeman.

16. The possibility of homicidal burns as stated to two police officers and her relations may be there but the possibility that the burns were suicidal in nature becomes prominent because of the victim's jumping in to the well near the Police Station. It is a settled

principle of law that when probability consistent with the innocence of the accused is established by the defence, the benefit thereof must go to the accused. Consequently, we are of the opinion that the learned trial judge ought to have considered these circumstances viz. that the victim herself stated before P.W. 2 - Dr. Chinchure that she had set herself on fire and, secondly, that she jumped into the well near the Police Station, after she had gone to the Police Station, and ought to have given benefit thereof to the accused.

17. In the result, we allow the appeal and set aside the conviction of the appellant for the offence punishable under section 302 of the Indian Penal Code and quash the sentence imposed. The appellant is on bail. His bail bonds stand cancelled. Fine, if paid, be refunded to the appellant.

(V.G. PALSHIKAR, J.)

(R.C. CHAVAN, J.)